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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; AMERICAN INTERNATIONAL GROUP, INC.; CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND GLS LEASCO OF MICHIGAN, INC.,
Petitioners,

v.

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY; AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Department of Transportation Form MCS-90, a federally mandated endorsement to a motor carrier's insurance policy, requires the insurance company to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." The issue presented is whether the MCS-90 Endorsement requires the insurance company to pay a judgment against a defendant that is not an insured under its policy.

LIST OF PARTIES

In addition to the parties listed in the caption, Lawrence P. Yob, Bath Transport, Inc., and Express Companies of Americas, Inc., defendants in the trial court, were parties in the Ohio Supreme Court.

CORPORATE DISCLOSURE STATEMENT

National Union Fire Insurance Company of Pittsburgh, Pa. is a wholly owned subsidiary of American International Group, Inc. ("AIG"), a publicly held corporation. No parent or publicly held company owns more than 10% of the shares of AIG. Petitioner Centra, Inc. ("Centra") is a privately held company. Petitioners Central Transport, Inc. and GLS Leasco of Michigan, Inc. are wholly owned subsidiaries of Centra.

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PETITION FOR A WRIT OF CERTIORARI

National Union Fire Insurance Company of Pittsburgh, Pa.; American International Group, Inc.; Centra, Inc.; Central Transport, Inc.; and GLS Leasco of Michigan, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App. 1a) is reported at 95 Ohio St. 3d 441 and 768 N.E.2d 1158. The opinion of the Court of Appeals of Ohio (App. 18a), is reported unofficially at 2000 Ohio App. LEXIS 5771 and 2000 WL 1804347. The judgment entry of the Ohio Court of Common Pleas (App. 26a) is not reported.

JURISDICTION

The opinion of the Supreme Court of Ohio was issued on June 12, 2002. That opinion reinstated the trial court's declaratory judgment that there was insurance coverage under the policy at issue here. That declaratory judgment had been certified by the trial court as a final judgment under Ohio R. Civ. P. 54(B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions from 49 U.S.C. §§ 13901, 13902, 13906, and 31139 (1994 & Supp. V 1999) are reproduced at App. 30a. The regulations promulgated under those statutory provisions are published at 49 C.F.R. §§ 387.1 to 387.419. Pertinent provisions are excerpted at App. 34a. The MCS-90 Endorsement, as set forth at 49 C.F.R. § 387.15, appears at App. 35a.

STATEMENT OF THE CASE

Federal law requires motor carriers to register with the Department of Transportation, 49 U.S.C. § 13901, and, as a

condition of registering, to satisfy "minimum financial responsibility" requirements prescribed by the Secretary of Transportation. *Id.* § 13902(a)(1)(C). Pursuant to this authority, the Secretary requires that insurance policies issued to motor carriers contain an endorsement, known as a "Form MCS-90 Endorsement." Under this endorsement, the motor carrier's insurer agrees to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." App. 38a.

In this case, the negligence of the operator of a tractor-trailer combination, each part separately owned and separately insured, was the cause of an accident resulting in the deaths of two persons. Respondents, the decedents' representatives, obtained declaratory judgments from the Ohio courts that there was insurance coverage for their wrongful death claims under two policies: (1) the policy issued to the owner of the tractor, which was also the employer of the driver and (2) the policy issued to the owner of the trailer. Coverage under the policy on the trailer is the subject of the instant petition. There was no claim below that the owner of the trailer was liable either directly or vicariously for the accident, and neither the tractor owner nor its driver was a covered insured under the trailer policy. The Ohio Supreme Court nonetheless ruled that the trailer's insurer was required by the MCS-90 Endorsement to provide coverage.

Certiorari should be granted to review this ruling because it contravenes the plain language of the MCS-90 Endorsement and the accompanying Department of Transportation ("DOT") regulations; is contrary to DOT's construction of its regulations, as recently briefed to this Court;[1] and stands in conflict with the decisions of at least

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[1] Brief for the United States as Amicus Curiae in *John Deere Insurance. Co.* v. *Nueva*, *cert. denied*, 122 S. Ct. 1063 (2002) (No. 00-

four circuits and of other state courts. The issue is a recurring one that will almost certainly be raised with increasing frequency in the future. For all of these reasons, the issue raised by this case warrants plenary review by the Court.

A. Regulatory Background

As noted above, 49 U.S.C. § 13901 requires that motor carriers be registered with the Department of Transportation. A prerequisite for such registration is compliance with minimum financial responsibility requirements. *Id.* § 13902(a)(1)(C). DOT may register a motor carrier only if it files "a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by [49 U.S.C. § 31139]." 49 U.S.C. § 13906(a)(1). The required security "must be sufficient to pay," up to the policy limit, "each final judgment against the registrant for bodily injury to, or death of, an individual resulting from negligent operation, maintenance, or use of motor vehicles . . . ." *Id.* The Secretary of Transportation must, in addition, "prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the coverage required . . . ." *Id.* § 13906(f).

Pursuant to these requirements, the Secretary of Transportation has promulgated regulations that, as relevant here, require motor carriers to carry at least $750,000 in insurance coverage. 49 C.F.R. § 387.9. Both the Secretary's own regulations and carry-over regulations initially promulgated by the Interstate Commerce Commission[2]

1491) (filed Jan. 3, 2002). Excerpts from this brief are reproduced below at App. 45a.

[2] The ICC was abolished by the ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803), and its functions were transferred to the Department of Transportation.

mandate that the required insurance policies contain Form MCS-90 as an endorsement. 49 C.F.R. §§ 387.15, 387.313(a)(4).[3]

The MCS-90 Endorsement is significant because liability insurance policies purchased by motor carriers typically contain terms that limit coverage to certain parties or property (*e.g.*, coverage may be excluded as to persons or vehicles not listed on the policy), condition coverage on the satisfaction of certain conditions (*e.g.*, that the insured give timely notice of an accident), or otherwise exclude certain types of claims. As a result, some judgments secured by an injured party against insured motor carriers might not be covered by standard insurance policies. By its terms, the MCS-90 Endorsement renders inoperative any limitations or exclusions in the base insurance policy on claims by the injured public against the named insured. It requires the insurer of a motor carrier to pay, within the limits of coverage, "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of [regulated] motor vehicles . . . [notwithstanding any] condition, provision, stipulation, or limitation contained within the policy . . . ." App. 38a.

The MCS-90 Endorsement does not, however, change the terms of the contractual relationship between the insurer and the insured motor carrier. It provides that "all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the [insurance] company." App. 39a. To that end, the MCS-90

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[3] The version of the MCS-90 Endorsement in the policy at issue here continued to refer to the "ICC" even though (as noted in the preceding footnote) that agency had been abolished in 1995. App. 35a. It was only in October 2001 that DOT adopted technical amendments to Form MCS-90 eliminating the references to the Interstate Commerce Commission. 66 Fed Reg. 49867, 49872-73 (Oct. 1, 2001).

Endorsement provides that the motor carrier "agrees to reimburse the [insurance] company for any payment . . . that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." *Id.*

B. Factual Background

On October 11, 1996, a tractor-trailer operated by Lawrence P. Yob crossed the median of the Ohio Turnpike and struck an automobile, killing both occupants. Yob was employed by the owner of the tractor, Bath Transport, Inc. ("Bath"). Through an insurance policy issued by National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), Bath maintained $1 million in coverage on the tractor (the "Tractor Policy"), with an MCS-90 endorsement of $1 million in potential coverage.[4]

The trailer was separately owned and separately insured. There was some dispute in the trial court as to exactly what entity owned the trailer at the time of the accident, *i.e.*, Centra, Inc., or one of its subsidiaries, Central Transport, Inc., or GLS Leasco of Michigan, Inc. (the "Centra defendants). It was agreed, however, that resolution of this issue was not necessary to disposition of the case. See App. 26a. All of those entities were covered by a separate insurance policy issued by National Union (the "Trailer Policy") that provided $2.5 million in coverage under its base policy and under the MCS-90 Endorsement.

It is undisputed that the Trailer Policy's definition of "insured" excluded coverage for both Yob and Bath.[5] The

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[4] Form MCS-90 in the Bath policy appeared to show $2 million in coverage, but the trial court reformed the policy on the ground that reference to $2 million, rather than $1 million, was the result of a mutual mistake. App. 27a.

[5] The Trailer Policy stated that "insured" did not include "[a]ny 'trucker' or his or her agents or employees, other than you and your employees: [¶] (1) if the 'trucker' is subject to motor carrier insurance

dispute litigated below and the issue raised by this petition is whether the MCS-90 Endorsement overrode the definition of "insured" in the Trailer Policy so as to require National Union to pay judgments against Yob and Bath under it.

C. Proceedings in the Court of Common Pleas

On January 24, 1997, Marie V. Lynch and Susan Reese, administratrices of the decedents' estates, filed a complaint for wrongful death in the Ohio Court of Common Pleas for Trumbull County against Yob; Bath; Bath's corporate parent, Express Companies of America, Ltd.; the Centra defendants, and the Ohio Turnpike Commission.[6] Thereafter, they filed an amended complaint in which they added National Union and its parent American International Group, Inc.,[7] as defendants. In this amended complaint, plaintiffs, in addition to pursuing their wrongful death claims for damages, sought a declaratory judgment that coverage was available to pay those claims under both the Tractor and Trailer Policies. Significantly, the amended complaint contained no allegation that negligence on the part of the trailer's owner was a cause of the accident. Nor was there any allegation that the trailer's owner was vicariously liable for someone else's negligence.

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requirements and meets them by a means other than 'auto' liability insurance." App. 42a. Under the policy's definition of "trucker" ("any person or organization engaged in the business of transporting property by 'auto' for hire" (App. 43a)), Bath was plainly a "trucker." Because Bath was subject to "motor carrier insurance requirements" and met them by a means "other than an 'auto liability insurance," namely through the MCS-90 Endorsement, it did not qualify as an insured under the Trailer Policy.

[6] The Turnpike Commission was not named as a defendant in the amended complaint.

[7] American International Group, Inc. ("AIG") is a holding company that does not itself issue any insurance policies. Rather, policies are issued through AIG's member companies such, as in this case, National Union. See, *e.g.*, App. 43a. The joinder of AIG in this matter was accordingly erroneous.

Yob's negligence in causing the accident was not contested, leaving the only issues to be determined the amount of plaintiffs' damages and the existence of insurance coverage to pay those damages. With respect to the latter issue, the trial court granted summary judgment to plaintiffs, holding (1) that the $1 million coverage on the Tractor Policy was available to the estates;[8] and (2) that, even though Bath and Yob were *not* insureds under terms of the Trailer Policy (App. 28a), coverage was nonetheless available under the MCS-90 endorsement to the Trailer Policy up to the $2.5 million limit. The court reasoned that "[s]ince the MCS-90 endorsement allows coverage, the underlying language of the policy cannot be used to negate that coverage . . . ."[9] App. 29a.

The trial court ordered the case to proceed to trial on the issue of damages, but certified the declaratory judgments on coverage as final under Ohio R. Civ. P. 54(B). See App. 29a.

D. Proceedings in the Court of Appeals of Ohio

The Court of Appeals of Ohio reversed the declaratory judgment finding coverage under the Trailer Policy. App. 18a. The court noted that the trial court's determination that Yob and Bath were not insureds under the terms of the Trailer Policy was supported by the policy's language and, moreover, had not been appealed by plaintiffs. App. 21-22a. The court then held that the trial court erred in finding coverage under the MCS-90 Endorsement, reasoning that "there must be a final judgment against an 'insured' to trigger its provisions." App. 22a. Because neither Yob nor Bath

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[8] The court did grant defendants' motion to reform Form MCS-90 so that it provided $1 million, rather than $2 million, in coverage. See note 4 *supra*.

[9] The court also denied the motion of the trailer owners to be dismissed. That determination was later reversed by the Court of Appeals, App. 25a.

were "insureds" under the Trailer Policy, "the MCS-90 endorsement could not magically transform them into 'insureds' under the endorsement." App. 24a.

E. Proceedings in the Supreme Court of Ohio

By a four-to-three vote, the Supreme Court of Ohio reinstated the trial court's declaratory judgment that, by virtue of the MCS-90 Endorsement, coverage was available under the Trailer Policy "even though the operator of the rig was not an insured under the terms of the trailer's main policy, and even though there is no claim that the trailer owner was negligent." App. 2a. The court relied principally on the decisions in *John Deere Insurance Co.* v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 1063 (2002) (No. 00-1491), and *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996). In those cases, the Ninth and Tenth Circuits, under somewhat different circumstances, ruled that the MCS-90 Endorsement provided coverage on claims against persons who were not insureds on the underlying insurance policy.[10] The Ohio court concluded, accordingly, that National Union's argument — that "the MCS-90 endorsement, the regulations giving rise to it, and the federal statutes authorizing the regulations all mandate by their explicit terms that there is no duty to indemnify a permissive user not covered by the underlying policy" — had been "specifically rejected by the holdings of" *Nueva* and *Adams*. App. 10a.

The Ohio court then considered other decisions pressed by National Union, where courts had ruled that the MCS-90 Endorsement did not supersede the definition of "insured" in

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[10] In *Nueva* and *Adams*, the policies defined "insureds" as including permissive users of the named insured's vehicle, but only if the vehicle was identified in the policy as a covered auto, which the accident vehicles in those cases were not. *Nueva*, 229 F.3d at 855; *Adams*, 99 F.3d at 966 & n.1. Here, as noted above, Bath and Yob were not insureds under the Trailer Policy by virtue of Bath being a "trucker." See note 5 *supra*.

the underlying policy, but for various reasons declined to follow them. App. 10-13a. See pp. 14-16 *infra*.

Likewise, the court rejected National Union's argument that the MCS-90's requirement that an insured reimburse its insurer for payments the insurer "would not have been obligated to make" but for the MCS-90 endorsement is inconsistent with the trial court's holding. National Union had asserted that, because an insurer has no contractual relationship with a permissive user, the insurer could never collect from such a user, but rather must seek reimbursement from its innocent insured. The court wrote off that concern as "peripheral" to its inquiry on the theory that it did not implicate the "key purpose" of the MCS-90 Endorsement — "to protect members of the public." App. 12a.

REASONS FOR GRANTING THE WRIT

This case raises a recurring issue of importance to the Nation's motor carriers and their insurers, as well as to the victims of accidents involving motor carriers: Who are the insureds covered by the MCS-90 Endorsement? The numbers of potentially affected persons is substantial. There are more than 500,000 registered motor carriers operating millions of trucks.[11] In 2000, 457,000 large trucks were involved in traffic accidents, of which 4,930 involved fatal crashes. One in eight fatal traffic accidents involved a large truck.[12] Certiorari should be granted so that carriers and their

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[11] U.S. Dep't of Transportation, Federal Motor Carrier Safety Administration, Fact Sheet, Safety Fitness (as of Oct. 1, 1999), *available at* http://www.fmcsa.dot.gov/factsfigs/factsheet.htm. The fact sheet shows that there were 505,900 active interstate motor carriers and 1.8 million combination trucks, 5.4 million tractors, and 19.7 million trailers or semitrailers.

[12] U.S. Dep't of Transportation, National Highway Traffic Safety Administration, Traffic Safety Facts 2000: Large Trucks, at 1 (DOT HS 809 325), *available at* http://www-fars.nhtsa.dot.gov/pubs/4.pdf.

insurers, as well as the lawyers representing accident victims, will know exactly who is covered by the MCS-90 Endorsement. Review in this case is especially warranted because the construction of the MCS-90 Endorsement adopted by Supreme Court of Ohio conflicts (1) with the plain meaning of the language of the Endorsement and the related DOT regulations, (2) with the interpretation of those provisions urged by the United States as amicus curiae in *John Deere Insurance Co.* v. *Nueva*, No. 00-1491, and (3) with the decisions of several U.S. Courts of Appeals and state courts.

The Court, of course, recently denied certiorari (122 S. Ct. 1063) in *Nueva*, apparently because the Solicitor General—though certain that the Ninth Circuit's decision was "incorrect"—said "the importance of the error [was] unclear." App. 54a. But the issue *is* an important one that will frequently recur, as this and other cases being litigated in the lower courts show. See p. 16 & note 18 *infra*. Now that the Department of Transportation has stated its position on the question, counsel representing carriers and their insurers will surely rely on that position in cases where plaintiffs seek coverage under the MCS-90 Endorsement for persons other than the named insured. Conversely, counsel for accident victims seeking to expand coverage under the Endorsement will base their arguments on the decision of the Ohio court in this case and the decisions of the Ninth and Tenth Circuits on which it relied. However the lower courts in those future cases decide the matter, the conflict in the interpretation of the MCS-90 Endorsement will only be exacerbated.

Rather than allow the present uncertainty to linger on until the conflict becomes intolerable, which would only drive up litigation and insurance costs, petitioners respectfully urge the Court to grant plenary review to resolve the issue now. Alternatively, they ask the Court to vacate the judgment below and remand the matter to Ohio Supreme Court so that the court can reconsider its decision in light of the position

adopted by the Department of Transportation, of which it was apparently unaware.[13]

I. The Amicus Brief for the United States in *Nueva* Demonstrates That the Ohio Court's Interpretation of the MCS-90 Endorsement Is Erroneous.

The Supreme Court of Ohio based its decision that the MCS-90 Endorsement alters the definition of "insured" in a motor carrier's insurance policy on the decision in *John Deere Insurance Co.* v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 1063 (2002). But, as the Solicitor General stated in his amicus brief in *Nueva*, the decision of the Ninth Circuit in *Nueva* "is incorrect," for "existing federal regulations do not require a carrier's insurer to satisfy a judgment entered against any party other than the carrier itself." App. 45a. That position, which reflects the "fair and considered judgment" of the Department of Transportation on the correct application of its regulations, is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins,* 519 U.S. 452, 461, 462 (1997) (citations and internal quotes omitted); accord, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). This is true even when that "fair and considered judgment" is rendered in an amicus brief. *Auer*, 519 U.S. at 462. Far from being either plainly erroneous or inconsistent with the regulations, the Department of Transportation's position is plainly correct.

First, 49 U.S.C. § 13906(a)(1) requires a registered motor carrier to file a security "sufficient to pay . . . for each final

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[13] The brief of the Solicitor General in *Nueva* was filed only a few days before argument before the Ohio Supreme Court in January 2002, and as a result the parties did not bring it to the attention of the Ohio court.

judgment *against the registrant*."[14] (Emphasis added.) Likewise, the regulations implementing the Act prohibit motor carriers from operating without proof of insurance "conditioned to pay any final judgment *recovered against such motor carrier*." 49 C.F.R. § 387.301(a)(1) (emphasis added). In short, covered motor carriers must maintain sufficient security or insurance to pay judgments entered *against themselves* — not to pay judgments entered against someone else.

The statute further specifies that the Secretary "may determine the type and amount of security" to be required, and shall "prescribe the appropriate form of endorsement" to fulfill the statutory requirements. 49 U.S.C. § 13906(d) & (f). Pursuant to that authority, the Secretary's regulations prescribe Form MCS-90 as the appropriate form of endorsement. 49 C.F.R. §§ 387.7(b)(3) and (d), 387.15 (Illus. I), 387.313(a)(4). That endorsement requires an insurer to pay "any final judgment recovered *against the insured* for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." App. 38a (emphasis added).

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[14] These regulatory provisions discussed in the text are the latest in a long line of statutes requiring motor carriers to obtain insurance or post other security. The Motor Carrier Act, 1935, required certificated or permitted motor carriers to post proof of insurance or other security "conditioned to pay . . . any final judgment *recovered against such motor carrier* for bodily injuries or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit . . . ." Interstate Commerce Act, § 215, as added, ch. 498, 49 Stat. 543, 557 (emphasis added). As codified and amended, the statute continued to require a motor carrier to file a security "sufficient to pay . . . for each final judgment *against the carrier* for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles." 49 U.S.C. § 10927(a)(1) (1994) (emphasis added). The ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803), which amended the relevant statutory provisions, simply carried forth the same approach, as shown in the text.

As the Transportation Department stated in the amicus brief in *Nueva*, the reference to "insured" in the MCS-90 Endorsement "can only sensibly be read to refer to the *named* insured to whom the underlying policies issued — that is, the motor carrier that must obtain the policy, so endorsed, in order to comply with federal statutory requirements." App. 46a (emphasis in original).

That reading is confirmed by 49 C.F.R. § 387.5. It defines "insured" for purposes of Subpart A of Part 387 (the subpart containing Form MCS-90) as meaning "the *motor carrier named* in the policy of insurance, surety bond, [or] endorsement . . . ." 49 C.F.R. § 387.5 (definition of "Insured and principal") (emphasis added). As the Solicitor General told the Court in the *Nueva* amicus brief (App. 46-47a), this definition resolves any doubt about the meaning of "insured" in the MCS-90 Endorsement. Moreover, as was pointed out in that brief, there are ten other iterations of the term "insured" in the MCS-90 Endorsement which are "most naturally read to refer only to the named insured," of which "at least three cannot fairly bear any other construction." App. 47a.

In short, the Supreme Court of Ohio decision contravenes the plain language of the statute, regulations, and MCS-90 Endorsement, as all have been interpreted by the agency that promulgated the regulations.

II. The Ohio Supreme Court's Decision Exacerbates the Conflict in the Decisions of the Lower Courts.

The Ohio Supreme Court based its ruling primarily on the decisions of the Ninth and Tenth Circuits in *John Deere Insurance Co.* v. *Nueva*, 229 F.3d 853, and *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964, respectively. Those decisions conflict with decisions from the District of Columbia, Eighth, Fifth, and Third Circuits holding that the federally required

insurance endorsements do not create coverage for any person other than the motor carrier named in the underlying policy,[15] and with comparable decisions from state courts.[16]

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[15] *National Mut. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 196 F.2d 597, 600 (D.C. Cir.) (The federal endorsement "does [not] make [the negligent driver] an 'insured' under the [motor carrier's] policy"—the definition of which "is still a matter governed by the express provisions of the body of the contract."), *cert. denied*, 344 U.S. 819 (1952); *Wellman* v. *Liberty Mut. Ins. Co.*, 496 F.2d 131, 139 (8th Cir. 1974) ("Since there was no judgment of liability against [the insured motor carrier], the regulations which . . . require insurance coverage for judgments against the carrier . . . may not be read into the insurance policy to impose liability upon the insurer of the motor carrier in contravention of the precise, express terms of the policy."); *White* v. *Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir.) ("[I]n order for [the insurer] to be liable under the policy filed by [the motor carrier] with the ICC, [the motor carrier] must first be adjudicated liable as a party."), *cert. denied*, 444 U.S. 965 (1979); *Carolina Cas. Ins. Co.* v. *Insurance Co. of N. Am.*, 595 F.2d 128, 139 (3d Cir. 1979) ("[N]either the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the motor carrier's insurer] the duties to defend claims . . . or to pay judgments entered against others."). See also *Jackson* v. *O'Shields*, 101 F.3d 1083, 1085 (5th Cir. 1996) ("Under the [MCS-90] Endorsement, [the insurer] undertook to pay any final judgment rendered against J & T Enterprises [the named insured motor carrier]."); *John Deere Ins. Co.* v. *Truckin' U.S.A.*, 122 F.3d 270, 275 (5th Cir. 1997) ("Because Copp Trucking is not an 'insured' under the Policy, the MCS-90 endorsement provides no basis for relief.").

[16] *Kesler* v. *Thedford*, 670 So. 2d 467, 471 (La. Ct. App.) ("[T]he motor carrier named in the policy of insurance is clearly not Thedford. Therefore, he is not an insured for purposes of the MCS-90 Endorsement."), *cert. denied*, 675 So. 2d 1085 (La. 1996); *Progressive County Mut. Ins. Co.* v. *Carway*, 951 S.W.2d 108, 113 (Tex. App. 1997, review denied) (holding that the motor carrier, not his driver, is an "insured" under the MCS-90 Endorsement); *Transport Indem. Co.* v. *Teter*, 575 S.W.2d 780, 786 (Mo. Ct. App. 1978) ("[The] provisions of law directly only that a *motor carrier* answer to the public for negligent injury caused by a vehicle . . .; they express no public policy that a motor carrier provide against the liability of a driver of a nonowned vehicle . . . .") (emphasis in original).

The Ohio Supreme Court sought to downplay this conflict, but its rationales are wholly unconvincing. The court distinguished some cases on the ground that they involved "disputes between two insurance companies." App. 11a. But construction of the phrase "judgment against the insured" as used in the MCS-90 Endorsement cannot reasonably be understood as meaning one thing when the claimant is an accident victim and another when the claimant is an insurance company.

The Ohio court also claimed that decisions, such as the Eight Circuit's in *Wellman*, "predate the present MCS-90 endorsement and its accompanying regulations." App. 11a. But the court failed to identify any respect in which the prior regulations were materially different from the present ones. On the contrary, the Solicitor General in *Nueva* described the regulation at issue in *Wellman* as being "essentially the same . . . [as] Form MCS-90." App. 53a.

Next, the Ohio Supreme Court discounted contrary state court decisions on the ground that they "are not as authoritative as the two federal appellate court decisions . . . ." App. 11a. But it is the "right and duty" of state courts to interpret and apply questions of federal law when raised in cases before them. See, *e.g.*, *Idaho* v. *Coeur d'Alene Tribe,* 521 U.S. 261, 275-76 (1997) (plurality opinion); *Howlett* v. *Rose*, 496 U.S. 356 (1990). The question of which of two conflicting lower court decisions to follow should turn upon which decision is the more persuasive — not the identity of the court that made the decision. As demonstrated above, the decisions of the Ninth and Tenth Circuit ignore the plain meaning of the Endorsement and accompanying regulations and are, accordingly, erroneous.

At base, the court below justified its strained interpretation of the MCS-90 Endorsement on the ground that "the key purpose of the MCS-90 . . . is to protect members of the public." App. 12a. But, that purpose only

relates to ensuring that judgments against the registered carrier can be promptly paid without waiting for resolution of any insurance coverage disputes — not to ensuring that judgments against some third party will be paid.[17] As the amicus brief in *Nueva* states: "It is not . . . central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier." App. 48a.

III. The Court Should Grant Review To Resolve the Continuing Conflict on the Proper Interpretation of the MCS-90 Endorsement.

In his amicus brief in *Neuva*, the Solicitor General, after demonstrating that the decision of the Ninth Circuit was erroneous, stated that he was "not persuaded that the court of appeals' erroneous decision in the present case merits plenary review by this Court." App. 55a. In part, that doubt was based on the question of how often the issue of who is the "insured" under the MCS-90 Endorsement was likely to be litigated. App. 54a. In fact, the issue has been litigated frequently in the recent past.[18] As this case shows, the issue

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[17] The Transportation Department's regulations state: "The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 C.F.R. § 387.1.

[18] See *Avalos* v. *Duron*, No. 00-2419, 2002 U.S. App. LEXIS 11426 (10th Cir. June 11, 2002) (unpublished decision applying *Adams*): *Miller* v. *Harco Nat'l Ins. Co.*, 241 F.3d 1331, 1333-34 (11th Cir. 2001) (certifying state law question to Georgia Supreme Court after district court dismissed claim against insurer because judgment had been entered against a related party rather than against the named insured carrier); *Nueva*, 229 F.3d at 858-59; *Adams*, 99 F.3d at 970; *Herkes* v. *Doe*, No. 01-0700 sec. M 2002 U.S. Dist. LEXIS 5747, at *5 (E.D. La. Mar. 25, 2002) (holding "where the policy provides no coverage for the vehicle,

is not going away. In fact, one case raising the issue is now pending in the New York Court of Appeals.[19] One can confidently predict that lawyers representing plaintiffs in accident cases involving trucks will pursue claims under the MCS-90 Endorsement against insurers of carriers that are not themselves liable on the basis of the decision in this case and the decisions in *Nueva* and *Adams*. This is particularly true in Ohio, where a series of controversial decisions under the state law of uninsured/underinsured motorist coverage[20] have triggered an explosion of lawsuits brought by a plaintiffs' bar that aggressively pursues claims for insurance coverage.[21]

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the MCS-90 Endorsement is triggered for the benefit of plaintiff"); *St. Paul Fire & Marine Ins. Co.* v. *Newman*, No. Civ. 99-0645-AH-C, 2000 WL 1367980, at *7 (S.D. Ala. Sept. 5, 2000); *Madere* v. *National Union Fire Ins. Co.*, No. Civ A. 98-3247, 2000 WL 1593441, at *8 (E.D. La. Oct. 24, 2000) (holding, in alternative, that MCS-90 obligation could be triggered by judgment against party other than named insured); *John Deere Ins. Co.* v. *Truckin' USA*, No. 3:95-CV-1556-D, 1996 WL 734952, at *4 (N.D. Tex. Dec. 10, 1996) (holding that the "'insured' referred to by the endorsement necessarily refers only to the named insured under the Policy"), *aff'd*, 122 F.3d 270 (5th Cir. 1997); *Del Real* v. *United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal. 1998), *aff'd mem.*, 188 F.3d 512 (9th Cir. 1999); *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.); *Progressive County Mut. Ins. Co.* v. *Carway*, 951 S.W.2d 108, 113 (Tex. App. 1997, review denied) (holding that the motor carrier, not his driver, is an "insured" under the MCS-90); *Kesler* v. *Thedford*, 670 So. 2d 467, 471 (La. Ct. App.) (affirming dismissal of insurer because "the motor carrier named in the policy of insurance is clearly not Thedford. Therefore, he is not an insured for purposes of the MCS-90 Endorsement."), *cert. denied*, 675 So. 2d 1085 (La. 1996).

[19] *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.).

[20] See, *e.g.*, *Scott-Pontzer* v. *Liberty Mut. Fire Ins. Co.*, 85 Ohio St. 3d 660, 710 N.E.2d 1116 (1999); *Ezawa* v. *Yasuda Fire & Marine Ins. Co.*, 86 Ohio St. 3d 557, 715 N.E.2d 1142 (1999).

[21] *Kormanik* v. *St. Paul Fire & Marine Ins. Co.*, 208 F. Supp. 2d 824, 826 (N.D. Ohio 2001) ("[T]he *Scott-Pontzer* line of cases has resulted in a burgeoning number of cases . . . .").

Courts in future cases will be put to the choice of either following the construction of the MCS-90 Endorsement expressed by the Transportation Department in the *Nueva* amicus brief or following the decisions of the Ohio court and the Ninth and Tenth Circuits. That conflict in the law will continue and can only intensify. Rather than allow the uncertainty to continue, the Court should grant review now to settle the matter.

The Solicitor General in *Nueva* also suggested that any error in the construction of the MCS-90 Endorsement could be rectified by interested parties petitioning DOT for a rule clarifying clarify DOT's regulations. App. 54-55a. But the regulations, properly interpreted by the DOT in a public brief, are clear now. There is no good reason to require a separate proceeding to make those rules more clear. Moreover, if the possibility of correction through rulemaking were an appropriate ground for denying certiorari, there would never be any reason for the Court to hear cases involving the interpretation of regulations. In any event, any future rulemaking proceeding could not correct the impact of the erroneous rulings of the Ohio Supreme Court and Ninth and Tenth Circuits in any cases where claims accrued prior to the adoption of any amended rule. Indeed, such a proceeding would likely create more uncertainty as to the effect of that new rule on pending cases. Finally, reliance on some future DOT rulemaking is unlikely to resolve the question expeditiously. After all, it took DOT six years to adopt technical amendments to its regulations to eliminate references to the abolished Interstate Commerce Commission. See note 3 *supra*.

In sum, the issue of the proper construction of the MCS-90 Endorsement is of continuing importance both to motor carriers, their insurers and the victims of accidents involving trucks. All desire (or, at least, should desire) to clarify the obligations of insurers in such cases. The Court should grant certiorari to provide the needed certainty

CONCLUSION

The Court should grant the petition and undertake plenary review. In the alternative, it should grant the petition, vacate the judgment of the Supreme Court of Ohio, and remand the case for consideration in light of the stated position of the Department of Transportation.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the Supreme Court of Ohio

SUPREME COURT OF OHIO

Nos. 2001-0210 and 2001-0121

MARIE V. LYNCH, ADMIN., et al.,
APPELLANTS

v.

LAWRENCE P. YOB, et al.,
APPELLEES

Submitted January 9, 2002—Decided June 12, 2002

Judges: ALICE ROBIE RESNICK, J. Douglas, F.E. Sweeney and Pfeifer, JJ., concur. THOMAS F. BRYANT, J. of the Third Appellate District, sitting for COOK, J. MOYER, C.J., T. BRYANT and LUNDBERG STRATTON, JJ., dissent

ALICE ROBIE RESNICK, J.:

{¶1} These appeals concern the scope of insurance coverage relating to a traffic accident, in which two automobile occupants died, that was caused by the admitted negligence of the operator of a tractor-trailer rig. At this point, questions pertaining to the coverage on the tractor involved in the accident have been resolved. At issue is

whether the policy of insurance covering the leased trailer involved in the accident is a potential source of recovery for the personal representatives of the accident victims and for their estates. The specific issue for consideration is whether coverage is available on the trailer under a federally mandated endorsement to the insurance policy, called an MCS-90 endorsement, even though the operator of the rig was not an insured under the terms of the trailer's main policy, and even though there is no claim that the trailer owner was negligent.

{¶2} To resolve this issue, we adopt the reasoning of recent decisions of two federal circuit courts of appeals and determine that coverage is available under the trailer policy's MCS-90 endorsement in this situation. We reverse the judgments of the court of appeals below and reinstate the judgment of the trial court.

I

Facts and Procedural History

{¶3} On October 11, 1996, an accident involving a tractor-trailer and an automobile occurred on the Ohio Turnpike. The driver of the automobile, Justin L. Reese, and his passenger, Stephen M. Wiley, were killed in the accident. The tractor-trailer was driven by defendant-appellee Lawrence P. Yob, an employee of the tractor's owner, defendant-appellee Bath Transport, Inc. ("Bath"), which is owned by defendant-appellee Express Companies of America, Ltd. Yob's negligence in causing the accident is not disputed. The tractor was insured by defendants-appellees American International Group, Inc. and National Union Fire Insurance Company of Pittsburgh (collectively "AIG"), with a policy limit of $1 million. It has now been established that this policy provides coverage for the accident and that the policy will indemnify Yob and Bath for any judgment against them up to the policy limit. It has further

been established that the tractor's policy had a federally mandated MCS-90 endorsement with a coverage limit of $1 million, which does not provide additional coverage beyond the $1 million provided by the tractor's liability policy.

{¶4} The parties agree that the trailer, owned by appellee GLS Leasco of Michigan, Inc., or by appellees Central Transport, Inc., and Central Cartage Company, was insured by AIG with a policy limit of $2.5 million.[1] The parties further agree that Bath and Yob are not included within the definition of "insureds" under this policy (because the policy specifically states that any "trucker" who is not an employee of the named insured is not an insured under its terms), so that coverage under the main policy is not available. Attached to this policy is an MCS-90 endorsement with a coverage limit of $2.5 million. The significance of the MCS-90 endorsement to the trailer policy is the subject of these appeals.

{¶5} On January 24, 1997, plaintiffs-appellants Marie V. Lynch, administrator of the estate of Stephen M. Wiley, and Susan Reese, administrator of the estate of Justin L. Reese, filed a wrongful-death action in the Trumbull County Court of Common Pleas against various defendants who allegedly were at fault in the accident. In an amended complaint, appellants revised the list of defendants, including the insurance companies as defendants, and added a claim for declaratory judgment, seeking to establish the extent and amount of coverage available under the tractor and trailer

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1. In an accident involving a tractor-trailer, the accident is considered to have arisen out of the use of each, and insurance coverage on both the tractor and the trailer is potentially implicated. See *Blue Bird Body Co., Inc. v. Ryder Truck Rental, Inc.* (C.A.5, 1978), 583 F.2d 717, 726-727.

policies. Although appellants in their initial complaint had included an allegation that negligent maintenance of the trailer contributed to the accident, appellants in their amended complaint dropped any allegation of wrongdoing by the trailer owner.

{¶6} All parties except Yob and Bath moved for summary judgment in the declaratory judgment portion of the action. Regarding the only issue pertinent to these appeals, appellants argued that coverage was available under the MCS-90 endorsement to the trailer policy. All appellees argued that coverage was unavailable. On that question, the trial court granted summary judgment to appellants, declaring that, although Bath and Yob were not insureds under the trailer policy, the MCS-90 endorsement to that policy applied and that coverage was available up to the $2.5 million policy limit. The trial court ordered the case to proceed to trial to determine appellants' damages and also determined under Civ.R. 54(B) that there was no just reason for delay in its judgment entry establishing the scope of insurance coverage.

{¶7} On appeal, the court of appeals reversed the judgment of the trial court pertaining to the trailer's MCS-90 endorsement, holding that there was no obligation for AIG to indemnify Bath and Yob under the trailer's MCS-90 endorsement for any damages appellants might recover against Bath and Yob. The court of appeals determined that "[b]y the plain language of the MCS-90 endorsement itself, there must be a final judgment against an 'insured' to trigger its provisions." The court of appeals went on to conclude that since neither Yob nor Bath, the only parties potentially liable for wrongful death, qualified as insureds in the underlying trailer policy, "the MCS-90 endorsement could not magically transform them into 'insureds' under the endorsement." The court of appeals found that appellees should have been granted summary judgment based on their argument that there was no coverage available to appellants

under the MCS-90 endorsement to the trailer policy. The cause is now before this court pursuant to the allowance of discretionary appeals.

II

The MCS-90 Endorsement

{¶8} Under the Motor Carrier Act of 1980, Sections 29 and 30, Public Law No. 96-296, 94 Stat. 793, July 1, 1980, certain commercial motor carriers engaged in interstate commerce must register with the United States Secretary of Transportation and must comply with minimum financial responsibility requirements established by the Secretary of Transportation. Sections 13902(a)(1) and 31139, Title 49, U.S.Code. To that end, Section 13906(a)(1), Title 49, U.S.Code provides:

{¶9} "The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes * * *. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except property [being shipped] * * *), or both."

{¶10} See, also, Section 387.301, Title 49, C.F.R., a regulation related to the above authority, which provides that no motor carrier shall engage in interstate commerce unless certificates of insurance or other securities or agreements are filed with and accepted by the Federal Motor Carrier Safety Administration, "conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles."

{¶11} Regulations prescribed by the Secretary of Transportation pursuant to Section 31139(b), Title 49, U.S.Code require a base coverage amount of at least $750,000, with more in some situations, to fulfill the financial responsibility requirements. Sections 387.7(a) and 387.9, Title 49, C.F.R. The regulations require that a specific endorsement form must be included in any insurance policy to satisfy the registration and financial responsibility requirements. This form, the MCS-90 endorsement, is set out at Section 387.15, Title 49, C.F.R., at Illustration I, and is titled "Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980."[2]

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2. An MCS-90 endorsement is often referred to as an ICC endorsement because its form was initially prescribed under statutes delegating some of the enforcement of their provisions to the Interstate Commerce Commission. However, the ICC was abolished by the ICC Termination Act of 1995, and its responsibilities were transferred to the Surface Transportation Board of the Department of Transportation. Public Law No. 104-88, Section 201, 109 Stat. 803, 932-934, December 1995. At that time, the registration and financial responsibility statutes at issue in this case were revised and renumbered. (In particular, Section 13906, Title 49, U.S.Code is similar in many respects to former Section 10927, Title 49, U.S.Code.) However, Congress provided that regulations issued by the ICC would "continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law." Public Law No. 104-88, Section 204(a), 109 Stat. 941. (See note following Section 701, Title 49, U.S. Code.) In 1996, current Section 387.301, Title 49, C.F.R., was redesignated to its present location. See 61 F.R. 54,706, 54,709. For our purposes here, the pertinent regulations have remained the same in all material terms since first prescribed pursuant to the Motor Carrier Act of 1980. For a discussion of the effect of the ICC Termination Act of 1995 on the federal regulatory scheme covering interstate motor carriers, see *Empire Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.* 117 Md. App. 72, 91-95, 699 A.2d 482 (1997).

{¶12} The MCS-90 endorsement provides:

{¶13} "In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. * * * [N]o condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement."

III

Applicability of the MCS-90 Endorsement

{¶14} Courts that consider the applicability of an MCS-90 endorsement, a federally mandated endorsement to motor carrier insurance policies, construe its operation and effect as a matter of federal law. See *Canal Ins. Co. v. First Gen. Ins.*

Co. (C.A.5, 1989), 889 F.2d 604, 610, modified on other grounds (C.A.5, 1990), 901 F.2d 45; *Ford Motor Co. v. Transport Indemn. Co.* (C.A.6, 1986), 795 F.2d 538, 545.

{¶15} In a recent decision, the United States Court of Appeals for the Ninth Circuit considered the applicability of an MCS-90 endorsement in a situation that was similar factually to the situation before us. In *John Deere Ins. Co. v. Nueva* (C.A.9, 2000), 229 F.3d 853, certiorari denied (2002), ___ U.S. ___, 122 S.Ct. 1063, 151 L.Ed.2d 967, a tractor-trailer driver allegedly negligently caused an accident. The tractor driver and its owner were uninsured. The trailer involved in the accident was owned by an unrelated company, and was insured by John Deere Insurance Company. Id., 229 F.3d at 854. There was no allegation that the trailer owner was negligent.

{¶16} Pursuant to the terms of the main policy on the trailer at issue, coverage was not provided for the driver and owner of the tractor involved in the accident, but that policy included an MCS-90 endorsement. The insurer sought a declaratory judgment that it had no duty to indemnify its insured (the trailer owner) or the driver and owner of the tractor for any liability arising out of the accident. The district court granted the insurer's motion for summary judgment, finding that the MCS-90 endorsement did not create coverage for the driver and owner of the tractor. Id., 229 F.3d at 854-855.

{¶17} On appeal, the parties seeking recovery for injury and damages caused by the accident contended that the insurer could not rely on the limiting provisions of the underlying policy to avoid indemnifying permissive users of noncovered vehicles because the MCS-90 endorsement modified the definition of "insured" in the underlying policy. Id., 229 F.3d at 859. The Ninth Circuit reversed the judgment of the district court and found that the MCS-90

endorsement to the trailer's policy obligated the insurer to indemnify the driver and owner of the tractor. Id. at 860.

{¶18} The court stressed that "the primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers." Id., 229 F.3d at 857. The court proceeded to follow the analysis of the Tenth Circuit Court of Appeals in *Adams v. Royal Indemn. Co.* (C.A.10, 1996), 99 F.3d 964, which it stated involved "nearly identical facts." Id. at 858. In *Adams*, the Tenth Circuit found that in this situation the MCS-90 endorsement indirectly modifies the insurer's policy definition of "insured" to expand coverage to include any permissive users of insured vehicles. See 99 F.3d at 970.

{¶19} The MCS-90 endorsement explicitly overrides any "condition, provision, stipulation, or limitation" in the policy that would relieve the insurer from its duty to pay, to the limits of the endorsement, a judgment against the insured for negligent operation. But appellees argue that this case does not involve any "condition, provision, stipulation, or limitation," and instead involves the more fundamental question of who is an insured under an insurance policy. Appellees contend that the MCS-90 endorsement operates to negate exclusions from coverage but cannot transform noninsured parties into insureds. In addition, appellees argue that there can be no recovery under the trailer owners' MCS-90 endorsement because there can never be a final judgment against the trailer owners, since appellants have dropped any allegations of the trailer owners' own negligence.

{¶20} Furthermore, appellees argue that *John Deere Ins. Co. v. Nueva* and *Adams* are distinguishable from this case because those cases involved underlying policies that limited coverage to specifically described vehicles, while this case involves a fundamentally different underlying policy limitation, that "truckers" other than employees of the named

insured are not covered while using the trailer. However, appellees' readings of *John Deere Ins. Co. v. Nueva* and *Adams* are much too restrictive. The end result of both those cases is that, on these facts, "an MCS-90 endorsement requires an insurer to indemnify a permissive user of a non-covered" vehicle. *John Deere Ins. Co. v. Nueva*, 229 F.3d at 858; *Adams*, 99 F.3d at 971. The case sub judice involves a permissive user of a noncovered vehicle, the leased trailer at issue, and so the rule of *John Deere Ins. Co. v. Nueva* and *Adams* is fully applicable. That rule that emerges from those cases is that the MCS-90 endorsement should be read to eliminate *any* limiting clauses in the underlying policy restricting the scope of coverage. See *Adams*, 99 F.3d at 971; *John Deere Ins. Co. v. Nueva*, 229 F.3d at 859.

{¶21} We find that although there may be some factual differences between the case sub judice and the two federal appellate decisions (for example, that there is coverage available on the tractor in this case while there was not in *John Deere Ins. Co. v. Nueva* and *Adams*), the reasoning of those two cases fully applies to our determination. Furthermore, while appellees argue that the weight of authority favors a finding of no obligation to indemnify in this situation, for various reasons none of appellees' cases has the precedential value of those two decisions.

{¶22} First, appellees' basic argument is that the MCS-90 endorsement, the regulations giving rise to it, and the federal statutes authorizing the regulations all mandate by their explicit terms that there is no duty to indemnify a permissive user not covered by the underlying policy. However, this argument was specifically rejected by the holdings of *John Deere Ins. Co. v. Nueva* and *Adams*. Therefore, appellees' citation of cases such as *Del Real v. United States Fire Ins. Crum & Forster* (E.D.Cal.1998), 64 F.Supp.2d 958, affirmed without published opinion (C.A.9, 1999), 188 F.3d 512, 1999 WL 626619, are not as authoritative as the two federal

appellate court decisions we follow. Furthermore, the district court in *Del Real* held that the MCS-90 endorsement did not even apply because the trailer at issue in that case was not a motor vehicle licensed to carry property in interstate commerce. 64 F.Supp.2d at 964-965. Therefore, any consideration of the specifics of the MCS-90's provisions was surely dictum. See *Pierre v. Providence Washington Ins. Co.* (2001), 286 A.D.2d 139, 144, 730 N.Y.S.2d 550.

{¶23} Second, cases involving disputes between two insurance companies, unlike those involving an injured member of the public seeking recovery under a MCS-90 endorsement, do not implicate the key rationale behind the MCS-90 endorsement, which is the protection of the public. Therefore, any statements cited by appellees within decisions such as *Natl. Mut. Ins. Co. of the Dist. of Columbia v. Liberty Mut. Ins. Co.* (C.A.D.C. 1952), 196 F.2d 597, and *John Deere Ins. Co. v. Truckin' U.S.A.* (C.A.5, 1997), 122 F.3d 270 (both of which were principally disputes between insurance companies), for the point that only the named insured can be covered by an MCS-90 endorsement are of limited value to our consideration. For a compilation of cases concerning the allocation of losses when an MCS-90 endorsement is involved, see Annotation, Effect of Motor Carrier Act Provisions on Insurance and Indemnity Agreements (49 U.S.C.A. §§ 13906, 14102) in Allocating Losses Involving Interstate Motor Carriers (1999), 157 A.L.R.Fed. 549.

{¶24} Third, some of appellees' cited cases predate the present MCS-90 endorsement and its accompanying regulations and statutes. Although there are similarities between the current regulatory system and that in place prior to 1980, the Motor Carrier Act of 1980 also worked some significant changes to the regulatory scheme. Therefore, cases such as *Wellman v. Liberty Mut. Ins. Co.* (C.A.8, 1974),

496 F.2d 131, can be distinguished from the situation we consider.

{¶25} Fourth, state court decisions (particularly those of intermediate state appellate courts) interpreting the MCS-90 endorsement, which is mandated by federal law, do not have the persuasive value of decisions by federal circuit courts. Therefore, cases such as *Powers v. Meyers* (1995), 101 Ohio App.3d 504, 655 N.E.2d 1358, and *Progressive Cty. Mut. Ins. Co. v. Carway* (Tex.App.1997), 951 S.W.2d 108, cited by appellees, are not as authoritative as the two federal circuit court decisions we follow.

{¶26} Finally, appellees argue that the reimbursement provision of the MCS-90 endorsement, which requires the insured to reimburse the insurer "for any payment that the company would not have been obligated to make under the provisions of the policy except for" the MCS-90 endorsement, is at odds with a holding that an insurer must indemnify a permissive user of a noncovered vehicle. They argue that because the insurer has no contractual relationship with such a user, the insurer would be unable to obtain reimbursement from that user. Thus the insurer would have to forgo reimbursement or seek reimbursement from its innocent insured. However, just as in the situation involving a dispute between two insurance companies discussed above, questions involving disputes between the insurer and the insured do not implicate the key purpose of the MCS-90, which is to protect members of the public, and, therefore, such questions are peripheral to our inquiry. These arguments based on the reimbursement provision were implicitly rejected in the two federal circuit court decisions we follow, particularly in *Adams*, 99 F.3d at 972, where the court stated, "In situations where the policy absent the endorsement did not insure the vehicle which caused the injuries, the endorsement explicitly requires that the insured reimburse the insurer because the insurer's payment to the

injured motorist is a 'payment the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.' See 49 C.F.R. § 387.15. Thus, the public is protected by insurance and ultimate responsibility rests on the truckers, all as mandated by Congress * * *." For a case interpreting the reimbursement provisions of the MCS-90 in the context of an insurer seeking reimbursement from its insured, see *T.H.E. Ins. Co. v. Larsen Intermodal Serv., Inc.* (C.A.5, 2001), 242 F.3d 667.

{¶27} In conclusion, we agree with the court in *John Deere Ins. Co. v. Nueva*, 229 F.3d at 860, which stated that finding the driver and owner of the tractor in this type of situation to be insureds under the MCS-90 endorsement allows the MCS-90 endorsement to serve "the purpose it was expressly designed to serve, modifying a policy to insure the availability of insurance for negligently injured members of the public." As in that case, interpreting the endorsement in the way advocated by appellees "would frustrate this express Congressional goal." Id.

{¶28} Accordingly, the judgments of the court of appeals are reversed, and the trial court's declaratory judgment that coverage is available pursuant to the trailer's MCS-90 endorsement up to the endorsement's coverage limit of $2.5 million is reinstated.

Judgments reversed.

Douglas, F.E. Sweeney and Pfeifer, JJ., concur.

MOYER, C.J., T. BRYANT and LUNDBERG STRATTON, JJ., dissent.

THOMAS F. BRYANT, J., of the Third Appellate District, sitting for COOK, J.

LUNDBERG STRATTON, J., dissenting.

{¶29} I respectfully dissent from the majority's expansive interpretation of the MCS-90 endorsement. I believe that federal legislation, the language of the endorsement, and the intent of the parties support the opposite conclusion.

{¶30} The federal government's Motor Carrier Act of 1980 established minimum financial responsibility requirements for motor vehicles used in interstate commerce. Sections 13902(a)(1) and 31139, Title 49, U.S.Code. The Act requires that a motor carrier have sufficient insurance to pay a final judgment against it. Section 13906(a)(1), Title 49, U.S.Code. The MCS-90 endorsement, required by the 1980 MCA, is required to be attached to a liability insurance policy issued to an interstate motor carrier. Section 387.15, Title 49, C.F.R. Its primary purpose is to protect the public by ensuring that a carrier has independent financial responsibility for the losses that arise out of that carrier's trucking operations.

{¶31} This is evident from the standard language the government placed in the MCS-90. It provides that the insurer agrees to pay any *final judgment recovered against the insured* from public liability resulting from negligence in the operation, maintenance, or use of motor vehicles that are subject to the Motor Carrier Act of 1980. The MCS-90 also provides that the *insured agrees to reimburse the insurer for any payment made* under the MCS-90 on account of an accident, claim, or suit that the insurer would not have had to make but for the MCS-90. Therefore, the MCS-90 protects the injured person who has obtained a judgment against the insured by ensuring that the judgment will be paid. For example, when an injured person obtains a judgment against an insured yet the insured's primary policy is not obligated to cover the loss, the insurer will pay the judgment against the insured under the MCS-90 regardless of any coverage

defenses or issues involving other insurance allocation. Under the MCS-90, the insurer may then recoup its losses from its insured.

{¶32} The majority follows *John Deere Ins. Co. v. Nueva* (C.A.9, 2000), 229 F.3d 853, certiorari denied (2002) ____U.S.___, 122 S.Ct. 1063, 151 L.Ed.2d 967, and *Adams v. Royal Indemn. Co.* (C.A.10, 1996), 99 F.3d 964, but acknowledges that both are factually different from this case. In *Adams*, the injured party was unable to collect the judgment he had obtained against the tortfeasor; in *John Deere,* the alleged tortfeasor did not have insurance and presumably would be unable to pay a judgment.. The *Adams* court acknowledged that the tortfeasor was not insured under the trailer's primary insurance policy, but expansively construed the MCS-90 to cover the unpaid judgment. The *Adams* court reasoned that the policy behind the MCS-90 was to protect against *uninsured* regulated vehicles. Id. at 968. *John Deere* followed the reasoning in *Adams* because the driver of the tractor in *John Deere* was uninsured and coverage under the MCS-90 was deemed necessary to achieve its purpose of making any judgment against him collectible. *John Deere*, 229 F.3d at 859-860.

{¶33} However, just one year earlier, the same court reached the opposite result when presented with circumstances more similar to the case before us. In *Del Real v. United States Fire Ins. Crum & Forster* (C.A.9, 1999), 188 F.3d 512, 1999 WL 626619, the Ninth Circuit affirmed without a published opinion the district court's decision to deny coverage under the MCS-90 to an injured party who had collected the insurance proceeds from the tractor's insurer. *Del Real v. United States Fire Ins. Crum & Forster* (E.D.Cal.1998), 64 F.Supp.2d 958. Del Real obtained a judgment against the driver and owner of the tractor, who had admitted liability for the accident. The judgment was paid in part by the owner's insurer. Del Real attempted to collect the

remainder of the judgment from the insurance covering the trailer after its owner had been dismissed from the underlying tort case. The district court held that the plaintiff was not entitled to recover under MCS-90 because neither the driver nor the owner of the tractor was an insured under the MCS-90 endorsement covering the trailer, and the endorsement obligates the trailer's insurer only to pay "any final judgment recovered against the insured." Id. at 964. I believe that the facts of *Del Real* are more closely aligned with the situation before us.

{¶34} I also believe that the majority's decision to expand the MCS-90's coverage to reach permissive users defies both logic and common sense. In this case, the negligence of the driver of the tractor was undisputed and the tractor's liability insurance policy will indemnify him and the tractor owner up to the policy limits. Allegations of negligence made against the trailer's owner have been dropped. The driver and owner were merely permissive users of the trailer and not considered insureds for purposes of the trailer's liability insurance or MCS-90 endorsement. There is no final judgment against the trailer's insured.

{¶35} Nevertheless, as a result of today's opinion, the trailer's insurer would have to pay a judgment against a party other than its own insured. Furthermore, the insurer now has a right under the MCS-90 to recoup the payment from its insured for another person's negligence. The majority acknowledges this problem as a peripheral issue that it need not consider. It is, however, an example of the majority's overreaching interpretation and the illogical results it yields.

{¶36} The word "insured" in the MCS-90 refers to the insured identified in the body of the primary liability policy. *Campbell v. Bartlett* (C.A.10, 1992), 975 F.2d 1569; *Natl. Mut. v. Liberty Mut.* (C.A.D.C.1952), 196 F.2d 597; *Del Real*, 64 F.Supp.2d 958. I do not agree that the meaning of

"insured" may be expanded to include permissive users who are not insured under the policy. The purpose of the MCS-90, as the majority stresses, is the protection of the public. However, it must be within the confines of the contractual relationship established by the MCS-90. Therefore, for the foregoing reasons, I respectfully dissent and would affirm the judgments of the court of appeals.

MOYER, C.J., and T. BRYANT, J., concur in the foregoing dissenting opinion

Appendix B

Opinion of the Court of Appeals of Ohio

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

CASE NO. 99-T-0065

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY, DECEASED, et al.,
APPELLEES

v.

LAWRENCE P. YOB, et al.,
DEFENDANTS-APPELLANTS

Before: FORD, P.J., CHRISTLEY, J., O'NEILL, J.

O'NEILL, J.:

Appellants, Lawrence P. Yob, Bath Transport, Inc., Express Companies of America, LTD., and Central Transport Inc., appeal a May 19, 1999 decision of the Trumbull County Court of Common Pleas, in a wrongful death action filed by appellees, Marie V. Lynch, Administratrix of the Estate of Stephen M. Wiley, and Susan Reese, Administratrix of the Estate of Justin L. Reese. The following facts are relevant to a determination of this appeal.

A fatal accident occurred on the Ohio Turnpike on October 11, 1996. A tractor-trailer, operated by Lawrence P. Yob, crossed the median and struck an automobile being

driven by Justin L. Reese, in which Stephen M. Wiley was a passenger. Reese and Wiley died in the accident. The tractor portion of the rig was owned by Yob's employer, Bath Transport, Inc. and its owner, Express Companies of America, Ltd. The trailer portion of the rig was owned by a separate entity, whose identity the parties dispute. Ownership of the trailer, however, is not a critical issue in this case.

On January 24, 1997, appellees filed a complaint in Trumbull County Court of Common Pleas against Yob, the owners of the tractor-trailer, and the Ohio Turnpike Commission for wrongful death. Appellees amended their complaint on June 17, 1998, to include both insurance companies. They also included a claim for declaratory judgment. On the same date, appellees filed a motion for summary judgment as to their complaint for declaratory judgment. It is undisputed that the insurance policy on the tractor owned by Bath Transport, Inc. had a limit of $1 million. This tractor policy also had an MCS-90 endorsement which stated that it had $2 million in potential coverage. The trailer had an insurance policy with a liability limit of $2.5 million, and it also had an MCS-90 endorsement indicating $2.5 million of potential coverage.

An MCS-90 endorsement is mandated by Section 29 of the Motor Carrier Act of 1980, *49 U.S.C. Section 10927,* and requires the insurer to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles." The MCS-90 endorsement derives from the financial responsibility regulations promulgated by the Secretary of Transportation pursuant to the Motor Carrier Act of 1980. The regulations require motor carriers to obtain minimum levels of security to protect the public, either in the form of insurance or a surety bond.

The questions for the trial court involved which of the foregoing coverages and endorsements were applicable to the underlying accident, and in what amounts. Upon summary judgment, the trial court determined that the $1 million policy on the tractor was available to the estates, but that the MCS-90 endorsement on the tractor, which had a stated limit of $2 million, was actually the result of a mutual mistake of fact and should have read $1 million. The trial court also held that the $1million MCS-90 endorsement was not excess coverage but would have been available had the primary coverage not been available.

Additionally, the trial court held that the $2.5 million trailer policy was not available because a "trucker" was not an insured under the terms and conditions of the policy. The court concluded, however, that the $2.5 million MCS-90 endorsement on the trailer was applicable and coverage was available as primary insurance, otherwise a failure of coverage would result. The trial court explained:

"The Court in making this finding relies upon *Powers v. Meyers, (1995), 101 Ohio App. 3d 504, 655 N.E.2d 1358,* which held that ICC endorsements would negate exclusions found in the underlying policy inconsistent withe *(sic)* the ICC endorsements. Since the MCS-90 endorsement allows coverage, the underlying language of the policy can not be used to negate that coverage and this Court finds it does apply."

Thus, in summary, the trial court determined that the underlying insurance policy on the tractor in the amount of $1 million was available, in addition to the MCS-90 endorsement on the trailer up to its $2.5 million limit. Additionally, the trial court denied the trailer owners' motion for summary judgment on appellees' negligence claims. The court ordered the case to proceed to trial on the issue of

damages, and Civ.R. 54(B) language was included in the judgment entry.

Appellants timely filed a notice of appeal and have now set forth the following assignments of error:

"1. The trial court incorrectly granted plaintiffs partial summary judgment in determining that the trailer owners' MCS-90 endorsement provided coverage for plaintiffs' claims.

"2. The trial court incorrectly denied defendants' motion for summary judgment concerning plaintiffs' purported negligence claims against the trailer owners.

In their first assignment of error, appellants contend that the trial court erred by granting, in part, appellees' motion for summary judgment and determining that the trailer owners' MCS-90 endorsement provided coverage for appellees' claims. It is appellants' assertion that since the underlying policy provided no coverage in this case because neither the owner of the tractor nor the driver fit the definition of "insureds," it was error for the trial court to conclude that the MCS-90 endorsement somehow created coverage by broadening the definition of an "insured." We agree.

Under the language of Section II, part A, of the underlying trailer policy, coverage was provided to an "insured" for bodily injury or property damage caused by an accident. Thus, by implication, someone who was not an "insured" was not covered. While we agree with appellees' representation of the law that insurance on both the tractor and trailer portions of a truck are applicable in an accident regardless of whether the tractor or trailer was physically involved in the accident, *Contrans, Inc. v. Ryder Truck Rental, Inc. (C.A.3, 1987), 836 F.2d 163, 165,* that issue cannot be reached until it is first determined who is an "insured." The trial court determined that a "trucker," such as

Yob, as driver, or Bath Transport, as tractor owner, were not "insureds" under the underlying trailer policy. This determination is supported by the language of the trailer policy which states, in part, that any "trucker," or his agents or employees, is *not* an insured, and this issue has not been appealed. Then, after specifying who is and who is not an insured, the policy lists thirteen exclusions in Section II, Part B, none of which are applicable to this case.

The trial court, however, then held that even though Yob and Bath Transport were not "insureds" under the underlying trailer policy, somehow the MCS-90 endorsement on the trailer made them insureds for purposes of that endorsement. We disagree with that conclusion. The express language of the MCS-90 endorsement, which governs determination of this appeal, states, in relevant part:

"In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, *any final judgment recovered against the insured* for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of *** the Motor Carrier Act of 1980 ***." (Emphasis added.) See 49 C.F.R. Section 387.15.

By the plain language of the MCS-90 endorsement itself, there must be a final judgment against an "insured" to trigger its provisions. In the case *sub judice,* none of the parties who can potentially be held liable for wrongful death are "insureds." Hence, the MCS-90 endorsement on the trailer is not available to appellees.

This conclusion has support in case law from various federal courts. In *John Deere Ins. Co. v. Truckin' USA* (N.D. Tex, 1996), No. 3:95- *CV-1556-D, 1996 U.S. Dist. LEXIS 22231,* aff'd (C.A. 5, 1997), *122 F.3d 270,* the court stated:

"The 'insured' referred to by the endorsement necessarily refers only to the named insured under the Policy ***. The purpose of requiring motor carriers to maintain insurance that includes the MCS-90 endorsement 'is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.' 49 C.F.R. Section 387.1. The policy behind the endorsement would not be affected by requiring an insurer to pay the final judgments against a motor carrier that it has not contracted with as its insured, and that would be required to maintain its own insurance that meets the minimum standards set forth by federal law. [The insurer] has demonstrated, as a matter of law, that Copp Trucking and Transport do not qualify as 'insureds' under any provision of the Policy. As such, there is no set of facts under which John Deere could become liable to Copp Trucking or Transport by virtue of the MCS-90 endorsement." (Emphasis added.) *1996 U.S. Dist. LEXIS 22231* at *15-16.

Similarly, in *Progressive County Mut. Ins. Co. v. Carway (1997), 951 S.W.2d 108,* the court held:

"There is not a single case holding that a driver/employee, who was not an insured under the plain terms of the policy, was nonetheless covered. In fact, the cases hold just the opposite.

"***

"It is one thing to hold that a motor carrier is absolutely liable -- based on the Interstate Commerce Act -- for injuries resulting from the negligent operation of vehicles leased to it, but it seems an unjustified and illogical leap to hold that an insurance company -- whose sole obligation rests on contract should be bound to pay a judgment for others who are not mentioned in the ICC insurance regulation (49 C.F.R. Section

1043.1), and who are specifically excluded by the language of the policy." *Id. at 114.*

The Tenth Circuit Court of Appeals has stated:

"The [MCS-90] endorsement itself does not define the term 'insured,' but we are satisfied 'that is still a matter governed by the express provisions of the body of the contract.' *National Mut. Ins. Co. v. Liberty Mut. Ins. Co., 90 U.S. App. D.C. 362, 196 F.2d 597, 600* (D.C.Cir.), cert. denied, *344 U.S. 819, 97 L. Ed. 638, 73 S. Ct. 15 (1952)." Campbell v. Bartlett (C.A. 10, 1992), 975 F.2d 1569, 1581.*

Even the First District Court of Appeals of Ohio has stated:

"The obligations of [the insurer] under the general liability and uninsured-motorist provisions of the policy arise only with respect to an insured as that term is defined for purposes of the policy. Similarly, the rights and obligations arising under the [MCS-90 Endorsement] are contingent upon the entry of a final judgment against an insured." *Powers v. Meyers (1995), 101 Ohio App. 3d 504, 511, 655 N.E.2d 1358.*

Based upon the foregoing opinions, we hold that an MCS-90 endorsement cannot be interpreted to, in effect, add "insureds" to an underlying insurance policy who are not "insureds" as that term is defined in the policy itself. Hence, in the instant cause, since neither Yob nor Bath Transport were "insureds" in the underlying trailer policy, the MCS-90 endorsement could not magically transform them into "insureds" under the endorsement. Appellants' first assignment of error is sustained.

In their second assignment of error, appellants assert that the trial court erred in denying their motion for summary judgment regarding appellees' negligence claim against the trailer owners. We agree.

A review of the record reveals the following. The trailer owners filed a motion for summary judgment in the trial court arguing that only Yob's employer, Bath, could be held vicariously liable for his negligent conduct. They also argued that no vicarious liability attached to them as a matter of law because Yob was operating the tractor-trailer pursuant to Bath's ICC authority. In response to the motion for summary judgment, appellees submitted a memorandum in opposition in which they conceded that respondent superior did not apply. Instead, they were pursuing their claim against the trailer owners solely on the basis that the trailer owners, by operation of law, must provide excess insurance coverage pursuant to the MCS-90 endorsement.

Based upon our decision regarding appellants' first assignment of error, it is clear that the trial court should have granted the trailer owners' motion for summary judgment. Hence, appellants' second assignment of error is also sustained.

Accordingly, the judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

Appendix C

Judgment Entry of the Ohio Court of Common Pleas

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Marie V. Lynch, Admx. et al
Plaintiff

v.

Lawrence P. Yob, et al
Defendant

JUDGMENT ENTRY

This cause is before the Court on cross motions for summary judgment regarding the issue of potential insurance coverage for the underlying accident. The Court has reviewed the motion, affidavits, memoranda, pleadings, exhibits, and the applicable law.

The underlying facts are not substantially in dispute. The lawsuit arises out of an accident on October 11, 1996 involving a tractor trailer vehicle operated by Lawrence P. Yob. The tractor was owned by Bath Transport Inc. (Bath) and the trailer was owned by a separate entity. Although that exact entity owning the trailer has not been stipulated by the parties, ownership is not essential to the Court ruling on the pending matters.

The tractor trailer was operated in a negligent manner, and as a result thereof, the Plaintiff's decedents, Justin L. Reese and Stephen M. Wiley were killed. The question before this Court is the nature and extent of any insurance coverage for

the tractor and trailer owners and the driver regarding this accident.

The parties are in agreement that Bath, as the owner of the tractor, would be a responsible party and any insurance Bath had on the tractor would be available to the extent of its legal limits. The insurance policy on the Bath tractor indicates a limit of liability of $1,000,000.00. The Bath Transport policy also has an MCS endorsement which states $2,000,000.00 in potential coverage.

The trailer, which the Defendant suggests is owned by GLS Leasco of Michigan, although that has not been entirely established, has a liability limit of $2,500,000.00 for each accident and the trailer also has a MCS endorsement of $2,500,000.00 as primary insurance. The Plaintiff moves for all underlying insurance and MCS endorsements in a cumulative fashion.

The Defendants argue that, although the Bath limits of $1,000,000.00 are available, that the MCS endorsement is not excess insurance and is only attached in order to comply with federal regulations. There is also an argument that the $2,000,000.00 figure on the MCS-90 is nothing more than a clerical mistake of fact. Several affidavits have been attached to the motion to establish the mistake. The suggestion being that the MCS-90 was actually $1,000,000.00 which is the same as the limits of the policy.

The Defendant trailer owners argue that since the trailer was not in any way negligent, or at fault regarding this accident, that its underlying insurance would not be available nor would its MCS-90. Further it is argued that the underlying insurance on the trailer specifically states that it would not be available under these circumstances. The Court must determine by way of declaratory action the nature and the extent of the insurance available.

The Court finds that $1,000,000.00 of the Bath tractor policy, is available regarding this accident. The Court further finds that the MCS-90 which states $2,000,000.00 was in fact as a result of a mutual mistake as to the fact and should have been $1,000,000.00. The Court further finds that the $1,000,000.00 is not excess but would have been primary in the event the $1,000,000.00 initial coverage was not available.

As to the trailer policy, this Court is persuaded that it is an accepted princip[le] that all insurance of the tractor and trailer would be applicable in an accident such as this regardless of whether the tractor or trailer was physically involved in the accident, *Bluebird Body Co. v. Ryder Truck Rental* (1978) 583 F.2d 717, *Contrans Inc. v. Ryder Truck Rental Inc.* 836 F.2d 163, *Insurance Co. of North America v. Royal Indemnity Co.* 429 F.2d 1014.

Therefore, the Court finds that the $2,500,000.00 of insurance upon the trailer would have been primary coverage. The Court also finds along with $2,500,000.00 in coverage through the MCS 90 Endorsement. However, the insurance policy on the trailer specifically excludes this type of incident where a "trucker" is not an insured under the terms and conditions of the policy.

The question then remains if the language of the policy specifically excludes coverage under these particular circumstances, does the MCS-90 endorsement become applicable for coverage? In this case the primary insurance is not available pursuant to exclusionary language in the policy. In order to avoid a failure of coverage, the MCS-90 endorsement would be applicable.

This Court finds that the MCS-90 endorsement on the trailer policy is applicable and coverage is available as primary insurance under the endorsement to the limits of liability of $2,500,000.00. The Court in making this finding

relies upon *Powers v. Myers*, (1995) 101 Ohio App.3d 504, which held that ICC endorsements would negate exclusions found in the underlying policy inconsistent with the ICC endorsements. Since the MCS-90 endorsement allows coverage, the underlying language of the policy can not be used to negate that coverage and this Court finds it does apply.

As to the declaratory actions at issue herein, the Court finds there is no dispute as to any material fact and that there is no genuine issue as to any material facts and after construing the evidence and arguments most strongly in favor of the non moving party, reasonable minds could come to but one conclusion.

In this case the Court finds by way of summary judgment that the Bath Transport insurance policy on the tractor is applicable to the limits of $1,000,000.00. As to the trailer policy, the Court finds the MCS-90 endorsement applicable and coverage is available to $2,500,000.00 as legal limits.

Case to proceed to trial as to the issue of damages.

This is a final and appealable Order and there is no just cause for delay.

Appendix D

Statutory Provisions Involved

Pertinent provisions of Title 49 of the U.S. Code are as follows:[1]

§ 13901. Requirement for Registration

A person may provide transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or be a broker for transportation subject to jurisdiction under subchapter I of that chapter, only if the person is registered under this chapter to provide the transportation or service.

§ 13902. Registration of Motor Carriers

(a) MOTOR CARRIER GENERALLY.— (1) IN GENERAL.— Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with—

(A) this part and the applicable regulations of the Secretary and the Board;

(B) any safety regulations imposed by the Secretary and the safety fitness requirements established by the Secretary under section 31144; and

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[1] Sections 13901, 13902, and 13906 appear in 49 U.S.C. (1994 ed., Supp. V). The principal parts of § 31139(b) and (e) appear in 49 U.S.C. (1994 ed.), and an amendment to §31139(b) appears in 49 U.S.C. (1994 ed., Supp. V).

(C) the minimum financial responsibility requirements established by the Secretary pursuant to sections 13906 and 31138.

* * *

§ 13906. Security of Motor Carriers, Brokers, and Freight Forwarders

(a) MOTOR CARRIER REQUIREMENTS.—(1) LIABILITY INSURANCE REQUIREMENT.—The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 and 31139, and the laws of the State or States in which the registrant is operating, to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A registration remains in effect only as long as the registrant continues to satisfy the security requirements of this paragraph.

* * *

(d) TYPE OF INSURANCE.—The Secretary may determine the type and amount of security filed under this section. A motor carrier may submit proof of qualifications as a self-insurer to satisfy the security requirements of this section. The Secretary shall adopt regulations governing the standards for approval as a self-insurer. Motor carriers which have been granted authority to self-insure as of January 1, 1996, shall retain that authority unless, for good cause shown and after

notice and an opportunity for a hearing, the Secretary finds that the authority must be revoked

* * *

(f) FORM OF ENDORSEMENT.—The Secretary shall also prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the coverage required under this section.

* * *

§ 31139. Minimum Financial Responsibility for Transporting Property

* * *

(b) GENERAL REQUIREMENT AND MINIMUM AMOUNT.—(1) The Secretary of Transportation shall prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts established by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property for compensation by motor vehicle in the United States between a place in a State and—

(A) a place in another State;

(B) another place in the same State through a place outside of that State; or

(C) a place outside the United States.

(2) The level of financial responsibility established under paragraph (1) of this subsection shall be at least $750,000.

* * *

(e) EVIDENCE OF FINANCIAL RESPONSIBILITY.—(1) Subject to paragraph (2) of this subsection, financial responsibility

may be established by evidence of one or a combination of the following if acceptable to the Secretary of Transportation:

(A) insurance.

(B) a guarantee.

(C) a surety bond issued by a bonding company authorized to do business in the United States.

(D) qualification as a self-insurer.

(2) A person domiciled in a country contiguous to the United States and providing transportation to which a minimum level of financial responsibility under this section applies shall have evidence of financial responsibility in the motor vehicle when the person is providing the transportation. If evidence of financial responsibility is not in the vehicle, the Secretary of Transportation and the Secretary of the Treasury shall deny entry of the vehicle into the United States.

Appendix E

Regulatory Provisions Involved

Pertinent provisions of the federal regulations governing motor carriers are as follows:[1]

§ 387.1 Purpose and Scope

This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

§ 387.5 Definitions

As used in this subpart—

* * *

Insured and principal— the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

* * *

---

[1] Sections 387.1, 387.5, 387.7, 387.9, 387.301, and 387.313 are quoted as they appear in 49 C.F.R (2001). Section 387.15 is quoted as it appears in 49 C.F.R (2000), the version in effect at the time of the accident at issue in this case. The MCS-90 Endorsement underwent an immaterial technical revision on October 1, 2001, to remove references to the Interstate Commerce Commission.

§ 387.7 Financial Responsibility Required

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart.

* * *

§ 387.9 Financial Responsibility, Minimum Levels

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS—PUBLIC LIABILITY

Type of carriage	Commodity transported	Jan. 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Property (nonhazardous)	$750,000
* * *	* * *	* * *

§ 387.15 Forms

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the FHWA and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in § 387.7 of this subpart. The continuous coverage requirement does not apply to Mexican motor carriers insured under § 387.7(b)(3) of this subpart. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I

Form MCS-90 (3/82)
Form Approved
OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to _____

of _____

Dated at _____

this ___ day of _____, 19__

Amending Policy No. _____

Effective Date _____

Name of Insurance Company _____

Countersigned by _____

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X", for the limits shown:

☐This insurance is primary and the company shall not be liable for amounts in excess of $_____ for each accident.

☐This insurance is excess and the company shall not be liable for amounts in excess of $_____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate

of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is: _____

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, DC).

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage

to human health, the natural environment, fish, shellfish, and wildlife.

Property Damage means damage to or loss of use of tangible property.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition,

insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

* * *

§ 387.301 Surety Bond, Certificate of Insurance, or Other Securities.

(a) *Public liability.* (1) No common or contract carrier or foreign (Mexican) motor private carrier or foreign motor carrier transporting exempt commodities subject to Subtitle IV, part B, chapter 135 of title 49 of the U.S. Code shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the FMCSA surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or

agreements, in the amounts prescribed in § 387.303, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to Subtitle IV, part B, chapter 135 of title 49 of the U.S. Code, or for loss of or damage to property of others, or, in the case of motor carriers of property operating freight vehicles described in § 387.303(b)(2) of this part, for environmental restoration.

* * *

§ 387.313 Forms and Procedures

(a) *Forms for endorsements, certificates of insurance and others.*

* * *

(4) *Use of Endorsements in MCS Series.* When Security limits certified under § 387.303 (b)(1) or (b)(2) involves coverage also required by the Department of Transportation a Form MCS endorsement prescribed by the Department of Transportation such as, and including, the Form MCS 90 endorsement is required.

* * *

Appendix F

Excerpts from Trailer Insurance Policy

SECTION II – LIABILITY COVERAGE

* * *

1. WHO IS AN INSURED

The following are "insureds":

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except

(1) The owner or anyone else from whom you hire or borrow a covered "private passenger type auto".

(2) Your employee or agent if the covered "auto" is a "private passenger type auto" and is owned by that employee or agent or a member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered "auto".

(5) A partner of yours for a covered "private passenger type auto" owned by him or her or a member of his or her household.

c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer" while the "trailer" is connected to another covered "auto" that is a power unit, or, if not connected:

(1) is being used exclusively in your business as a "trucker"; and

(2) is being used pursuant to operating rights granted to you by a public authority.

d. The owner or anyone else from whom you hire or borrow a covered "auto" that is not a "trailer" while the covered "auto":

(1) is being used exclusively in your business as a "trucker"; and

(2) is being used pursuant to operating rights granted to you by a public authority.

* * *

However, none of the following is an "insured":

a. Any "trucker" or his or her agents or employees, other than you and your employees:

(1) if the "trucker" is subject to motor carrier insurance requirements and meets them by a means other than "auto" liability insurance.

(2) If the "trucker" is not insured for hired "autos" under an "auto" liability insurance form that insures on a primary basis the owners of the autos and their agents and employees while the "autos" are being used exclusively in the "truckers" business and pursuant to operating rights granted to the "trucker" by a public authority.

* * *

SECTION VI – DEFINITIONS

* * *

B. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include "mobile equipment".

* * *

N. "Trucker" means any person or organization engaged in the business of transporting property by "auto" for hire.

* * *

ENDORSEMENT FOR
MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY
UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to FLINT SPECIAL SERVICES, INC. of 34200 MOUND ROAD, STERLING HTS., MI 48310

Dated at CLEVELAND, OHIO this 22nd day of NOVEMBER, 1996

Amending Policy No. RMCA 143-86-32 Effective Date - 06-30-96 to 06-30-97

Name of Insurance Company NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Telephone Number (216) 479-8800. Countersigned by

s/ _____.

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "☐", for the limits shown:

☒ This insurance is primary and the company shall not be liable for amounts in excess of $2,500,000 for each accident.

☐ This insurance is excess and the company shall not be liable for amounts in excess of $ _____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the Federal Highway Administration (FHWA) or the Interstate Commerce Commission (ICC), the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date.

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, D.C.)

* * *

[Remainder of Endorsement appears at pp. 37a to 39a.]

Appendix G

Excerpts from the Brief of the United States as Amicus Curiae in *John Deere Insurance Co. v. Nueva*, *cert denied*, 122 S. Ct. 1063 (2002) (No. 00-1491)

[9]

* * *

DISCUSSION

1. The court of appeals' decision is incorrect. It is true, as the court emphasized (see Pet. App. 10a-11a), that the financial responsibility provisions of Title 49 (as they apply to both registered and unregistered carriers) and the Secretary of Transportation's implementing regulations are intended to protect the public in the case of accidents involving vehicles owned or operated by commercial motor carriers. They guarantee, in effect, that there will be resources available (up to the statutory or regulatory responsibility limit) to pay a final judgment obtained by an injured member of the public against a carrier for injury caused by the negligent operation, maintenance or use of a carrier's vehicles—even if the policy itself does not provide coverage in a particular case, and even if the carrier is otherwise insolvent. They also protect the public against **[10]** delays in the enforcement of such a judgment that might otherwise result from disputes over coverage between the carrier and its insurer, or between different insurance companies. Contrary to the court of appeals' conclusion, however, existing federal regulations do not require a carrier's insurer to satisfy a judgment entered against any party other than the carrier itself.

a. As explained above (see p. 2, *supra*), Section 13906 of Title 49 conditions federal registration of a commercial (or

"for-hire") motor carrier on the carrier's filing with the Secretary proof of insurance (or other security) sufficient to pay, up to a prescribed limit, "for each final judgment *against the registrant* for bodily injury" or property damage "resulting from the negligent operation, maintenance, or use of motor vehicles." 49 U.S.C. 13906(a)(1) (emphasis added). The limitation expressed in the italicized words is repeated in the applicable regulation, 49 C.F.R. 387.301 (see pp. 2-3 & note 3, *supra*), which requires the submission of insurance or other security "conditioned to pay any final judgment recovered *against such motor carrier*" (emphasis added). Essentially the same limiting language is carried over to the MCS-90 endorsement form that the Secretary prescribes for use in complying with both the registration requirements and the similar financial responsibility requirements that apply to all carriers (registered or unregistered). See 49 C.F.R. 387.15. Because, however, that form is designed to be attached to an insurance policy, it provides that the insurer will pay "any final judgment recovered *against the insured*." In the context of the statutory and regulatory provisions that the MCS-90 form is designed to implement, that language can only sensibly be read to refer to the *named* insured to whom the underlying policy is issued—that is, the motor carrier that must obtain the policy, so endorsed, in order to comply with federal statutory requirements.

[11] If there were any doubt about that construction of the MCS-90 form, it would be resolved by the definitions set out in the Secretary's regulations and by the other uses of the term "insured" within the Form MCS-90 itself. The applicable definitional provision specifies that for purposes of the regulations set out in Sections 387.1-387.17, the term "insured" means "the motor carrier *named* in the policy of insurance" or other security. 49 C.F.R. 387.5, "Insured and principal" (emphasis added). Moreover, the term "the insured" appears in ten other places within the body of the

MCS-90 Form. See Pet. App. 40a-43a (reprinting form). One of those occurrences is simply parallel to the use already quoted. *Id.* at 43a ("upon failure of the company to pay any final judgment recovered against the insured"). All the rest, however, are most naturally read to refer only to the named insured, see, *e.g.*, *id.* at 42a ("does not apply to injury to or death of the insured's employees"), and at least three cannot fairly bear any other construction. See *id.* at 41a ("Cancellation of this endorsement may be effected by the company or the insured."); *id.* at 42a (endorsement amends underlying policy "to assure compliance by the insured" with federal financial responsibility requirements); *id.* at 43a (all terms of policy remain "binding between the insured and the company").

Apart from the clarity of the pertinent statutory, regulatory and contractual provisions, limiting the obligation assumed by an insurer under the federal financial responsibility rules to judgments entered against the named insured makes sense for at least two reasons. First, although the federal scheme requires the modification and expansion of typical private insurance contracts, it uses such contracts as its starting point and basic tool (rather than, for example, requiring motor carriers to contribute to a publicly administered fund for the compensation of persons injured by uninsured commercial vehicles). The MCS-90 endorse-**[12]** ment requires an insurer to accept liability beyond that which it might accept in a purely private transaction, but it also requires a corresponding agreement by the insured motor carrier to reimburse the insurer for any loss that would not be covered by the underlying policy. See Pet. App. 43a (Form MCS-90). The incremental risk imposed on the insurer is therefore principally the risk that the carrier will not be able to satisfy such a reimbursement obligation. The risk of non-reimbursement is one that an insurer can evaluate fairly easily with respect to prospective named insureds, but not with

respect to third parties. Because the statutory and regulatory provisions operate by setting minimum standards for otherwise private insurance arrangements (including, in a few cases, self-insurance), it is far more natural to interpret those provisions to require motor carriers and insurers to include in their private arrangements payment and reimbursement obligations that benefit the public, but run only to each other.

Second, the federal financial responsibility provisions focus on requiring motor carriers to carry adequate insurance to protect the public from risks created by the carriers' own operations. It is central to that purpose to assure that an injured member of the public will be able to recover on a judgment against the carrier, even if the particular vehicle involved in an accident was for some reason not "specifically described in the policy," or was driven on a route the carrier was not authorized to serve, and "irrespective of the financial condition, insolvency or bankruptcy of the insured." See Pet. App. 42a, 43a (terms of Form MCS-90). It is not, however, central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier. If the registered motor carrier is legally responsible—directly, indirectly, or [13] vicariously—for injuries caused by the operation of one of its vehicles, then it should be possible for the injured party to obtain a judgment against the carrier. The federal financial responsibility provisions were designed to ensure the collectability of any such judgment—not to relieve the injured party from the obligation to obtain a final determination of legal liability (see *id.* at 42a, requiring insurer to pay any "final judgment" for public liability), or to vary the legal rules under which such a determination is to be made.

b. In deciding this case in favor of respondents, the court of appeals ignored the statutory and regulatory provisions described above. The court focused instead on the endorsement's provision that the insurer must pay a judgment "regardless of whether or not each motor vehicle [subject to the financial responsibility provisions] is specifically described in the [underlying] policy." Pet. App. 13a (emphasis omitted). Construing that language in light of the general purpose of the financial responsibility provisions to protect injured members of the public (*id.* at 10a-11a), the court concluded (*id.* at 14a) that "the effect of the MCS-90 endorsement is to modify the policy's definition of an 'insured,'" both with respect to the named insured and with respect to permissive users, by "negat[ing] the limitation [in the policy language] that only users of 'covered autos' are 'insureds.'" That conclusion rests, however, on a fundamental misunderstanding of the endorsement.

Form MCS-90 is not intended, and does not purport, to vary any term of the underlying coverage. To the contrary, the form specifically *preserves* those terms as between the insurer and the named insured. See Pet. App. 43a. The endorsement does require the insurer to pay certain judgments entered against the motor carrier, whether or not the events giving rise to the judgment come within the policy's coverage, and subject to reimbursement by the carrier if they do not. It does not, however, "modify the policy's [14] definition of an 'insured'" (*id.* at 14a), either with respect to the named insured *or* with respect to permissive users.

If an injured party obtains a judgment against the insured motor carrier (for public liability resulting from negligence with respect to vehicles subject to the financial responsibility requirements), the endorsement requires the insurer to pay the judgment, without regard to coverage under the policy. Conversely, if the injured party obtains a judgment against a

defendant other than the insured motor carrier, the insurer may or may not be required to pay that judgment *under the policy*—for instance, if the defendant was driving a "covered auto" with the permission of the named insured, see Pet. App. 4a-5a, 14a—but it will have no obligation to make payment under the endorsement. Thus, the policy and the endorsement, while linked, impose different obligations based on different key determinants: An obligation to indemnity (*i.e.*, pay without reimbursement) based on the policy's coverage of a particular risk, on the one hand, and on the other an obligation to make payment in the first instance, subject to possible reimbursement, based on a final judgment entered *against the motor carrier itself*. The court of appeals erred in confusing those two obligations.

2. The Ninth Circuit in this case relied on and endorsed a similar decision reached by the Tenth Circuit in *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (1996). See Pet. App. 11a-14a. *Adams*, like the decision below, erred in construing Form MCS-90 to require an insurer to satisfy a judgment entered against a permissive user of a vehicle not covered by the underlying policy, on the theory that the endorsement "modifie[d] [the term] 'insured' as defined in the basic polic[y]." See *Adams*, 99 F.3d at 970; see also *Pierre* v. *Providence Washington Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001).

Petitioner contends (Pet. 20-25) that the decisions in this case and in *Adams* conflict with decisions of the Third, Fifth, [15] Eighth, and District of Columbia Circuits. Although we agree that it is difficult to reconcile some of the reasoning in those cases with that of the decision below, the cases petitioner cites are distinguishable from this one in various respects.

In *National Mutual Insurance Co.* v. *Liberty Mutual Insurance Co.*, 196 F.2d 597, cert. denied, 344 U.S. 819

(1952), the D.C. Circuit held that the insurer of a truck owner-driver who had been found liable for an accident could not recover the cost of that judgment from the insurer of the motor carrier that had hired the truck and driver. The court refused to base such liability, which was excluded by the terms of the carrier's policy, on the endorsement then required by the Interstate Commerce Commission—a precursor to the present Form MCS-90, which also provided for the (potentially reimbursable) payment of "any final judgment recovered against the insured" for injuries resulting from negligence in the operation of regulated vehicles. *Id.* at 599. It reasoned that although the endorsement "doubtless would have enured to the benefit of [the injured party], had she chosen to sue [the motor carrier]," it did not "make [the owner-driver] an 'insured' under the [carrier's] policy." *Id.* at 600.

Although that reasoning reflects a proper understanding of the language now incorporated in Form MCS-90, and is inconsistent with the Ninth Circuit's misinterpretation of that form in this case, it did not receive extended consideration from the D.C. Circuit in *National Mutual*. The holding in that case is, moreover, plausibly distinguishable from the holding below, because *National Mutual* involved a dispute over liability between two insurers, rather than a suit by an injured member of the public seeking initial satisfaction of a final judgment arising out of a trucking accident. That contextual point is one that the court below clearly considered significant to its decision, and that the **[16]** D.C. Circuit might also consider significant in a future case. Compare Pet. App. 11a (distinguishing cases on ground that "the integral purpose of the MCS-90, to protect third party members of the public, is not implicated in a dispute between two insurers"), with *National Mutual*, 196 F.2d at 598 ("This is a controversy between two insurance companies over which of them shall bear the burden of a loss."). In addition,

although the ICC endorsement at issue in *National Mutual* included the "judgment recovered against the insured" language that we think is central to proper resolution of this case, it did not include the specific language—"regardless of whether or not each motor vehicle is specifically described in the policy"—that the Ninth Circuit considered to be the "critical" feature of Form MCS-90. Compare 196 F.2d at 599 with Pet. App. 6a, 13a; see also *Adams*, 99 F.3d at 966, 968, 970. Accordingly, it is unclear whether the D.C. Circuit, if faced with a case identical to this one, would consider the result compelled by the holding or reasoning of *National Mutual*. The same is true, for essentially the same reasons, of the Third Circuit and its decision in *Carolina Casualty Insurance Co.* v. *Insurance Company of North America*, 595 F.2d 128, 135-139 & n.25 (1979).

The other two decisions that petitioner cites (Pet. 21-24) did not, as petitioner acknowledges (see Pet. 23), construe the language of the MCS-90 or its predecessor ICC endorsement. In *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F.2d 131, 136-137 (1974), the Eighth Circuit held that a motor carrier's insurance policy did not by its terms provide for the payment of a judgment recovered against an owner-driver hired by the carrier, where at the time of the accident the driver was not using his vehicle "exclusively in the business of the named insured." The court refused to vary that result on the basis of statutory and regulatory provisions different from those at issue in this case, which provided in general that a carrier that leased a vehicle must [17] accept legal responsibility for its operation. *Id.* at 138-139; see 49 U.S.C. 304(e)(2) (1970); 49 C.F.R. 1057.4 (1970); cf. 49 U.S.C. 14102(a)(4) (successor provision). In discussing that point, the court referred to the ICC's regulation requiring motor carriers to carry insurance that would pay final judgments recovered "against * * * [the] carrier." 496 F.2d at 138-139 & n.8; see 49 C.F.R. 387.301 (successor regulation). The court reasoned that because the

regulation dealing specifically with insurance—essentially the same one that is now implemented using the Form MCS-90—did not require a carrier to carry a policy that would cover judgments rendered against a party other than the carrier, it would "seem[] an unjustified and illogical leap" to hold that the separate legal responsibility provisions allowed recovery directly against the carrier's insurer, when the injured party had not taken the intermediate step of obtaining a judgment against the carrier itself. See 496 F.2d at 138-139.

Similarly, in *White* v. *Excalibur Insurance Co.*, 599 F.2d 50, 55 cert. denied, 444 U.S. 965 (1979), the Fifth Circuit held in part that the legal responsibility provisions relating to leased vehicles could not be invoked to force a carrier's insurer to pay a judgment rendered against a truck driver for negligently causing an accident that killed his fellow driver. In so holding, the court relied on *Wellman* for the proposition that under 49 U.S.C. 315 (succeeded by present Section 13906), "in order for [the insurer] to be liable under the policy filed by [the carrier] with the ICC, [the carrier] must first be adjudicated liable as a party." 599 F.2d at 55.

Like the D.C. Circuit's reasoning in *National Mutual*, the quoted statements from *Wellman* and *White* reflect a proper understanding of statutory and regulatory provisions now implemented in part through Form MCS-90, and to that extent those decisions may be said to conflict with *Adams* and the decision below. Neither decision focused, however, on the financial responsibility provisions, and neither dealt **[18]** with the text of a policy endorsement or with the present versions of the relevant statutes and regulations. Thus, as with D.C. and Third Circuits and their decisions in *National Mutual* and *Carolina Casualty*, it is not clear that either the Fifth or the Eighth Circuit would conclude that its precedents foreclose the result reached by the Ninth Circuit on the facts of this case.

3. Although the decision below is incorrect, the importance of the error is unclear. In order for the court's misinterpretation of Form MCS-90 to make a real difference, a registered motor carrier that itself carries proper insurance must first allow use of one of its vehicles (including a vehicle for which it is legally responsible, see, *e.g.*, 49 U.S.C. 14102(a)(4); 49 C.F.R. 376.12(c)(1)) by another party, who causes harm to a member of the public through negligent operation, maintenance, or use of the vehicle. The vehicle in question must be subject to the federal financial responsibility requirements, but for some reason not covered by the ordinary terms of the carrier's policy—a circumstance that the carrier will normally have strong financial (and legal) incentives to avoid. The injured party must then choose (or be able) to obtain a judgment only against the permissive user, not against the carrier (or must obtain a separate and larger judgment running only against the user). Moreover, in order for that result to be unjust, the carrier must have a valid defense that it asserted or could have asserted to avoid legal liability (direct, indirect, or vicarious) for the harm.

These circumstances are not wholly unlikely to occur; and, as petitioner points out (Pet. 27-28), the number of policy endorsements and accidents that could conceivably present the issue is at least theoretically quite large. The issue does not, however, appear to have been litigated with any great frequency in the past, including in the nearly five years between the decisions in *Adams* and in this case.

[19] Moreover, and perhaps most important, the error in both *Adams* and this case is an error in the interpretation of a form promulgated by regulation. It could therefore be fixed through a regulatory proceeding before the Department of Transportation's Federal Motor Carrier Safety Administration, which is the expert agency charged by Congress with administering the provisions of federal law dealing with motor carrier safety. "Any interested person,"

including petitioner or its amici, could ask the Administrator of the FMCSA to consider the situation and clarify the existing regulations, including Form MCS-90 itself. See 49 C.F.R. 389.31; cf., *e.g.*, *Minimum Levels of Financial Responsibility for Motor Carriers: Environmental Restoration*, 51 Fed. Reg. 33,854 (1986) (interim rule amending definition of "environmental restoration" in 49 C.F.R. 387.5 and 387.15 (Illus. I) (Form MCS-90), adopted "[i]n response to a joint petition filed by the American Insurance Association (AIA) and the American Trucking Associations (ATA)"). The Department of Transportation informs us, however, that it has received no request for regulatory action or, apart from this Court's order in the present case, for further administrative guidance with respect to the proper interpretation of Form MCS-90.

Under these circumstances, we are not persuaded that the court of appeals' erroneous decision in the present case merits plenary review by this Court. We do note, however, that in deciding the case, the court below did not have the benefit of any official expression of the views of the Department of Transportation in construing the endorsement in the Form MCS-90 issued by the Department. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997). Because those views are now a matter of record, this Court might wish to consider granting the petition, vacating the judgment below, and remanding the case for further consideration in light of the positions expressed in this brief. See *Raquel* v. **[20]** *Education Mgt. Corp.*, 531 U.S. 952 (2000); *Statewide Reapportionment Advisory Comm.* v. *Theodore*, 508 U.S. 968 (1993); *Oberly* v. *Baltimore & Ohio R.R.*, 479 U.S. 980 (1986); see also *Slekis* v. *Thomas*, 525 U.S. 1098 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in light of the views expressed herein.

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